IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 215 OF 2006

Mr. Sao Tome Colaco,
son of Jose Francisco
Colaco, aged 59 years,
business, r/o First Floor,
Tripoli Bldg., Pajifond,
Margao, Goa. ... Applicant

versus

M/s. Valentine Ship Services,
having office at F. X. Towers,
Vasco-da-Gama, Goa represented
by his Proprietor Mrs. Benedicta
Dias, having office at F. X. Towers,
Vasco-da-Gama, Goa. ... Respondent

Mr. Nitin Sardessai, Advocate for the Applicant.

CORAM : N. A. BRITTO, J.

DATE : 28TH JUNE, 2006.

ORAL ORDER

Heard Mr. Nitin Sardessai, the learned Counsel on behalf of the complainant. The complainant having prosecuted the accused, under Section 138 of the Negotiable Instruments

Act, 1881, the accused came to be acquitted by Judgment dated 23-2-2006 of the learned J.M.F.C., Vasco-da-Gama and now the said complainant is before this Court seeking Special Leave to Appeal against the said acquittal.

2. From the facts stated in the case, it is revealed that one Mrs. Benedicta Dias had a Ship Chandling business known as M/s. Valentine Ship Services and it is rather strange to know that who was prosecuted as an accused in this case is not the said Benedicta Dias as the Proprietor of the said Shipping business but the said M/s. Valentine Ship Services through its Proprietor, the said Benedicta Dias. We proceed on the assumption that it is Mrs. Benedicta Dias who was prosecuted as an accused. It was later admitted by the complainant, although the complainant came before the Court that the said loan was given to Mrs. Benedicta Dias, that the complainant had given the money i.e. to say Rs.10,00,000/-, Rs.5,00,000/- in cash and another Rs.5,00,000/- by way of Demand Draft, to the husband of the said Benedicta Dias, namely Peter Dias. In fact, the complainant himself produced a statement of account to show that the money which was advanced by the complainant to the

said Peter Dias, husband of Benedicta Dias, was deposited by him in the Joint Account of Mrs. Benedicta Dias, the said Peter Dias and one G. M. V. Colaco. The subject matter of the complaint was a cheque in the sum of Rs.5,00,000/- only, dated 16-11-2002 signed by the said Peter Dias on behalf of M/s. Valentine Ship Services as its P.A. Holder. There is no dispute that before the statutory notice was served upon Mrs. Benedicta Dias the said Peter Dias had expired and it does appear from the cross-examination of the complainant that Mrs. Benedicta Dias came to be prosecuted because she was asked to make the payment, and according to the complainant, she had agreed initially to make the said payment. As the subject cheque was signed by Peter Dias as P.A. Holder of M/s. Valentine Ship Services the complainant produced before the trial Court a copy of General Power of Attorney dated 5-2-1988. One does not know as to how the complainant was able to obtain a copy of the said Power but it is submitted that the same was obtained from the Bank where Mrs. Benedicta Dias had an account. It appears that at the time of availing the said loan of Rs.10,00,000/- the said Peter Dias had executed two promissory notes in the sum of Rs.5,00,000/- each which were

not produced by the complainant in the trial and that too without any explanation. The learned J.M.F.C. observed that there is no dispute that Mrs. Benedicta Dias had not drawn the cheque and that there was no evidence that the said Peter Dias was doing business along with his wife. The learned J.M.F.C. also referred to the General Power of Attorney and observed that the said Power of Attorney did not entitle the Attorney(the husband of Mrs. Benedicta Dias) to issue the cheque, as was rightly pointed out on behalf of the accused. On behalf of the complainant reliance is placed on the following clause in the said Power of Attorney which reads as follows:-

> "The said Attorney is also authorized to operate all my accounts of the said business, encash all cheques, operate all my Bank accounts of my said business and for that purpose to sign all such documents as and when required by those concerned authorities and Banks".

3. Mrs. Benedicta Dias in her statement recorded under Section 313 of the Code of Criminal Procedure, 1973 stated that the money was taken by her husband and it was not utilized for

her business, namely that of M/s. Valentine Ship Services, and, that appears to be so, on the complainant's own showing that the money advanced by the complainant to her deceased husband was deposited in the said Joint account. It was also not the case of the complainant that Mrs. Benedicta Dias had issued the said cheque towards the liability of her husband.

4. Mr. Nitin Sardessai, the learned Counsel on behalf of the complainant has submitted that the power given by Mrs. Benedicta Dias to her husband was to operate all her accounts and would also include the power to sign the cheques on her behalf and in support thereof Mr. Sardessai has also relied upon a decision in the case of **Statex Mills** v. **C. N. P. Rukmani** (2004(1) DCR 325). That was a case where the wife was the proprietrix of Beearr Textiles and she had purchased the materials from the complainant-Company, namely Statex Mills to the tune of Rs.2,34,000/- and by way of payment, she had caused a cheque to be issued by Power of Attorney, namely her husband, to the said amount, but, when the cheque was presented in the Bank the same was returned with an endorsement "insufficient funds" and thereupon as required

under the Negotiable Instruments Act, 1881 a notice was sent, both to the Power of Attorney, namely the husband of the respondent and the respondent. Both did not receive the notice as the notice was returned unclaimed. The Power of Attorney, who was arrayed as A-2 had died and the proprietrix, who was instrumental for getting the materials at whose instance the cheque was issued was prosecuted. The application to drop the proceedings was filed alleging that the complaint did not disclose whether she was actually in charge of the conduct of the business of the firm and the learned Magistrate appeared to have upheld the allegation and dropped the proceedings but the High Court held that the Magistrate had erred in dropping the proceedings.

5. In my view, the fact situation in this case is quite different in that Mrs. Benedicta Dias was nowhere in the picture at all and it is the complainant who had advanced the money to the husband of Mrs. Benedicta Dias and who had not even deposited it in the business account of Mrs. Benedicta Dias and as stated by Mrs. Benedicta Dias he did not even use it for the business of the said Mrs. Benedicta Dias. If it was so, the

complainant would have produced the statement of account of the business of Mrs. Benedicta Dias. On the contrary complainant fortified the case of Mrs. Benedicta Dias by producing the statement of another account. The relevant clause reproduced hereinabove gave specific power to the husband of Mrs. Benedicta Dias to encash all cheques but did not give any power to issue or sign all the cheques on her behalf. Likewise, it gave power to her husband to receive all moneys but did not give power to pay all or any money on her behalf. The Power of Attorney has got to be construed strictly because on the basis of the same criminal liability is sought to be imposed on the said Benedicta Dias. Mrs. Benedicta Dias was therefore not the drawer of the cheque and being so she could not be prosecuted. The view held by the learned J.M.F.C. is quite a plausible view, and in that view of the matter, in my view, this would not be a fit case to grant leave to appeal. It appears that Mrs. Benedicta Dias came to be wrongly prosecuted, upon the death of her deceased husband only because according to the complainant she had initially agreed to make the payment of the money paid by the complainant to her husband.

6. In view of the above, the application is dismissed.

N. A. BRITTO, J.

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